Filed 1/29/19 P. v. Johnson CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HERBERT STANLEY JOHNSON,

Defendant and Appellant.

F074435

(Super. Ct. No. F13910790)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Herbert Stanley Johnson was one of three perpetrators who attacked and robbed two victims. He was convicted of two counts of second degree robbery, one count of assault with a deadly weapon, and one count of assault by means likely to cause great bodily injury. In this appeal, he argues: (1) the evidence was insufficient to prove him guilty of one of the robberies and one of the assaults, for which the prosecution's theory required him to be an aider and abettor; (2) the trial court gave an erroneous jury instruction on the elements of robbery, which was prejudicial as to one of the robbery counts; and (3) the sentence for one of the robbery counts should have been stayed under Penal Code section 654.[1] We reject these arguments.

Johnson was 16 years old at the time of the offenses. Pursuant to Welfare and Institutions Code provisions amended by Proposition 57, and our Supreme Court's holding in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*), we conditionally reverse the judgment and remand the case to the juvenile court.

FACTS AND PROCEDURAL HISTORY

The district attorney filed an information on October 15, 2014, charging Johnson and two co-defendants, R.S. and K.G., with four counts: (1) second degree robbery (§ 211) of Albert G., in the commission of which Johnson personally inflicted great bodily injury (§ 12022.7, subd. (a)) and personally used a deadly weapon (§ 12022, subd. (b)(1)); (2) assault with a deadly weapon (a club) (§ 245, subd. (a)(1)) upon Albert G., in the commission of which Johnson personally inflicted great bodily injury (§ 12022.7, subd. (a)); (3) second degree robbery (§ 211) of Andrew C.; and (4) assault upon Andrew C. by means likely to cause great bodily injury (§ 245, subd. (a)(4)). Johnson was tried alone.

---

1 Subsequent statutory references are to the Penal Code unless otherwise noted.

At trial, Albert testified that he and Andrew were cousins, and on April 19, 2013, they were at their grandparents' house watching television and playing video games. Around 9:30 p.m., the two cousins left the house and walked to a gas station to buy some candy and soda for their grandmother. On the way, they saw two women on the sidewalk, who screamed as if startled. Albert saw that they were reacting to a male person crouching on the sidewalk in a darkened place, where he was hard to see. Albert and Andrew continued on to the gas station, where they bought the candy and soda. They headed back to their grandparents' house, Albert carrying the items for their grandmother in a black plastic bag. When they reached the point where the person had been crouching, there were two more males, standing on opposite sides of the sidewalk. As Albert and Andrew passed by this group, Albert got hit. He was hit three or four times on the side of his face. The first blow was from a fist, and there were two or three more from a stick. The stick was about three feet long and about two or three inches thick. It was smooth and curved, and Albert thought it looked like a tree branch. Albert felt one of his teeth fall out. He dropped the grocery bag. As these things were happening, Albert saw Andrew pinned to the ground by another assailant. In the courtroom, Albert identified Johnson as the person who hit him with the stick.

After hitting Albert, Johnson said "give me what you got," or "[g]ive me all you got." Albert had $14 from his grandparents, which he took out of his pocket and tossed down. Johnson picked it up. Albert saw someone else take Andrew's iPod and pick up the plastic bag of candy and soda. Then the assailants fled.

Albert testified that he and Andrew got up and went back to the gas station to call the police. Albert was taken to a hospital in an ambulance. His jaw was broken and required surgery, after which it was wired shut for months. He also testified that he suffered a seizure a few weeks after the attack, and had begun staying home almost all the time because he felt apprehensive about people.

Andrew testified at trial. As he recalled, he and Albert went to the store on the night in question to buy blunt wraps (a cigar-rolling material usually made of tobacco leaves). When they were attacked, Andrew first heard a loud snap like a stick hitting something and breaking, but he did not see the stick. Then he saw Johnson punching Albert a number of times with his fist. Albert dropped the plastic bag. R.S. tackled Andrew, pulled him to the ground and held him down. Andrew's iPod fell out of his pocket. While these things were happening, a third person, the one Andrew and Albert had seen on the way to the store, kept a lookout. Johnson picked up the bag of items from the store, R.S. picked up the iPod, and the three perpetrators fled. Andrew sustained scrapes on his back and elbow.

James Olson, an investigator with the district attorney's office, testified about statements he took from three witnesses during his investigation of the crimes: T.G., Jeanette Baskin, and Tyesha Phelps Thomas. T.G. was Johnson's girlfriend. Baskin is T.G's mother; and T.G., Johnson and their children lived with her. Thomas was a friend of Baskin.

T.G. told Olson that on the night of the offenses, Johnson came home with some of his friends. Johnson had a stick. T.G. did not know where the stick came from or where it had gone.

At trial, T.G. testified that on the night in question, she was watching television with Johnson around 9:30 p.m. or 10:00 p.m. He left once to go to the store. He had nothing with him when he came back. She did not remember talking to Olson at all.

Baskin told Olson she was at home on the night of the offenses around 10:00 or 10:30 p.m. Johnson had gone out with some friends earlier. He returned with R.S., K.G., and another boy. As they came in, they were "laughing and talking about what they had done and didn't get caught." Johnson said he had "cracked" someone "with a stick." R.S. had a black plastic bag with a two-liter bottle of Pepsi inside.

At trial, Baskin testified that on the night of the incident, she was sitting on the couch with T.G. and Thomas around 9:00 or 10:00 p.m. Johnson was there and left with R.S. and K.G. After a while, Johnson returned alone. She was not sure whether he said he cracked someone with a stick. R.S. returned later. Baskin did not remember whether he had a black plastic bag. She conceded, however, that she spoke to Olson, that Olson returned later with her statement in writing, and that she had said the things Olson attributed her.

Thomas told Olson she was visiting Baskin around 9:30 p.m. on the night of the offenses. Johnson entered the house with several other boys. They were "laughing and talking about beating somebody up and getting away with it." Johnson had a walking stick and one of the other boys had a two-liter bottle of Pepsi. Olson also testified that Thomas spoke to him in the courthouse prior to her testimony, and said she did not want to testify because she lived down the street from "whoever was involved in this crime" and was afraid.

Thomas testified at trial. She admitted she visited Baskin on the night in question, but she did not remember seeing Johnson. She denied telling Olson anything except that she saw nothing and knew nothing.

Johnson made a statement to police, an audio recording of which was played for the jury. In the statement, Johnson repeatedly denied any involvement in the incident, but finally admitted he was there. He said he was standing and talking with R.S. and K.G. when the victims walked up. K.G. hit one of the victims and ran away. Then R.G. began fighting with a victim. While that was happening, the other victim grabbed Johnson. Johnson punched him one time, and then ran away while R.G. was still fighting. He did not witness the theft of the victims' property and believed Albert's jaw must have been broken after he (Johnson) left. He did not use a stick or see anyone use a stick. Johnson said he thought the fight began for gang-related reasons.

Johnson did not testify at trial.

The jury found Johnson guilty as charged. The court sentenced him to a prison term of seven years, calculated as follows: on count 1, the lower term of two years, plus three years for the great bodily injury enhancement and one year for the deadly weapon enhancement; on count 3, one year (one-third of the middle term), to run consecutive to the sentence on count 1; on count 2, the lower term of two years plus three years for the great bodily injury enhancement, stayed pursuant to section 654; on count 4, the lower term of two years, stayed pursuant to section 654.

DISCUSSION

I. Sufficiency of evidence of aiding and abetting on counts 3 and 4

The victim of the offenses in counts 3 and 4 was Andrew. The evidence indicated that Johnson was Albert's attacker and Andrew was attacked by one of the co-perpetrators. Johnson maintains he could be guilty of counts 3 and 4 only as an aider and abettor, and the evidence was insufficient to show he aided and abetted a co-perpetrator in attacking and robbing Andrew.

When considering a challenge to the sufficiency of the evidence to support a judgment, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

To prove a defendant was a direct[2] aider and abettor of a crime committed by another, the prosecution must establish three things: (1) a crime committed by the direct

---

[2] The jury in this case was not instructed on the natural-and-probable-consequences theory of aiding and abetting.

perpetrator; (2) the mens rea of the aider and abettor: knowledge of the direct perpetrator's criminal intent and an intent to help carry it out; and (3) the actus reus of the aider and abettor: conduct that helped to carry out the crime. (*People v. Valdez* (2012) 55 Cal.4th 82, 146.)

Johnson's theory is that because he attacked Albert, not Andrew—and there was no evidence of an actus reus Johnson committed to assist the co-perpetrator in the attack on Andrew—the situation is the same as it would be if he and the co-perpetrator happened by coincidence to be committing robberies and assaults against different victims independently in the same place at the same time. Neither helped the other, so no more can be said about Johnson and the attack on Andrew than that Johnson was present and failed to intervene.

This theory is mistaken. From the victims' testimony describing the incident, the jury could reasonably infer that Johnson and the other perpetrator launched a coordinated attack from opposite sides of the sidewalk with the shared intent to assault and rob both victims. The participation of each aided the crimes of the other, since an attack by only one would have required that one to overcome both victims alone. Thus Johnson's actus reus with respect to counts 3 and 4 was taking on Albert so the other perpetrator could take on Andrew without interference (just as the inverse would be the other perpetrator's actus reus with respect to counts 1 and 2).

This conclusion was reinforced by the police statements of T.G., Baskin and Thomas about Johnson returning home with the co-perpetrators, talking about what they had done. The jury could reasonably view those statements as further evidence that they did it in concert.

Johnson cites several cases in which it was held that a defendant involved in a dispute was not proved to have aided and abetted a companion in committing murder, because there was no showing that the defendant knew of the companion's intent to commit the homicidal act or assisted in its commission. (*People v. Lara* (2017) 9

Cal.App.5th 296, 319-325 [dispute among five gang members over spoils of burglary led to two members shooting and killing a third, but evidence did not prove fourth and fifth members shared killers' purpose or assisted their homicidal acts]; *People v. Butts* (1965) 236 Cal.App.2d 817, 836-837 [defendant and companion fought two adversaries; companion killed his adversary with knife, but defendant did not aid and abet murder because he had only "awareness of participation in a fist fight, not a knife fight"]; *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1276-1279 [minor stood behind his older brother as brother argued with, then shot and killed, gang rival; minor's conviction of murder as aider and abettor reversed because evidence did not show he shared brother's criminal purpose or assisted in shooting].)

This case is not similar. The evidence sufficiently supported findings that, in attacking Albert, Johnson was intentionally doing his part in carrying out an attack on Albert and Andrew in concert with his co-perpetrator, and that the actions of each perpetrator assisted the other, since an attack by two against the pair of victims was surely more effective than an attack by either alone would have been. There was no question of the co-perpetrator escalating the crime without the defendant's knowledge, as in the above cases.

For these reasons, we reject Johnson's argument that the evidence was insufficient to support his conviction as an aider and abettor on counts 3 and 4.

II. Inclusion of certain portions of the legal definition of possession in the jury instruction stating the elements of robbery

The jury was instructed with a modified version of CALCRIM No. 1600, setting forth the elements of robbery. One element is that property was taken from another person's possession and immediate presence. Regarding the meaning of possession, the instruction stated:

"Two or more people may possess something at the same time.

> "A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

The statement that two or more people may possess something at the same time is not included in the pattern instruction.

Johnson contends that the portion of the instruction explaining possession was included erroneously. He describes this portion of the instruction as a definition of "constructive possession" and says it was erroneous to include it because "[c]onstructive possession principles were not applicable to the circumstances of [this] case." He states that he is *not* claiming that there was insufficient evidence to support the instruction, and he does not claim it stated the law incorrectly in the abstract. Instead, he claims constructive possession was irrelevant to the case, so the instruction was likely to be confusing to the jury.

Johnson's account of *how* it would be confusing to the jury is somewhat obscure, but his point seems to be this: The robbery instruction as given enabled to jury to find that Johnson aided and abetted the robbery of Andrew because the bag of groceries taken from Albert was in the joint possession of Albert and Andrew. The theory would be that the co-perpetrator used force on Andrew, and Johnson caused Albert to drop the grocery bag, thus helping the co-perpetrator rob Andrew by assisting in taking property of which Andrew was in possession jointly with Albert.

Johnson maintains that this conclusion would be erroneous as a matter of law. He cites *People v. Scott* (2009) 45 Cal.4th 743. There, in the context of on-duty employees' constructive possession of their employers' property, it was held that "[f]or constructive possession, courts have required that the alleged victim of a robbery have a 'special relationship' with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*Id.* at p. 750.) Johnson contends that there could be no constructive possession in this case because there was no special relationship between Albert and Andrew with respect to the grocery

bag. He argues that for this reason, his conviction on count 3, robbery of Andrew, should be reversed.

The relationship between Albert and Andrew is not necessarily the point, however. The jury could reasonably find that neither of them was the owner. Instead, it could find their grandmother owned the bag of groceries because they had been bought for her with her money. Further, the jury could reasonably find that, Albert and Andrew having been sent out by their grandmother together to buy the groceries, both had "authority or responsibility to protect the stolen property on behalf of" their grandmother. Alternatively, the jury could reasonably find that Albert and Andrew were joint owners of the bag of groceries in addition to or instead of their grandmother, and that as both were in its presence and had the right to control it, both were robbed of it when it was taken. The idea that both Albert and Andrew were in possession of the bag of groceries thus was not irrelevant and it could reasonably be relied on by the jury.

Of course, as explained above, there was no need for the jury to take this circuitous route in finding that Johnson aided and abetted the robbery of Andrew. It could take the more direct route of finding that Johnson and his co-perpetrator acted together in robbing Albert and Andrew because they stationed themselves on opposite sides of the sidewalk and closed in on the two victims at the same time with the intent to rob them as a team. But if the jury did take the circuitous route, it was not error.

In sum, the portions of the instruction objected to by Johnson did not misstate the law, were not irrelevant to the facts of the case, and did not present any danger of confusion. There was no error.

III. Section 654

As indicated above, the trial court applied section 654 to stay the sentences on counts 2 and 4, but imposed an unstayed sentence on count 3. Johnson argues that section 654 required the court to stay the sentence on count 3 as well.

Section 654 provides, in part, as follows:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

This statute bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, overruled on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 344.) We review under the substantial evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) As always, we review the trial court's conclusions of law de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

Johnson's contention is that section 654 required the sentence on count 3 to be stayed because his single act of attacking and robbing Albert was the basis of his convictions of both count 1 and (via aiding and abetting) count 3.

This argument is mistaken for two reasons. First, count 1 and count 3 constituted multiple convictions under the same statute, section 211. Our Supreme Court has held that because section 654 refers to acts punishable in different ways *by different provisions of law*, it does not require or authorize the staying of the sentence on a second conviction under a single statutory provision. (*Correa, supra,* 54 Cal.4th at p. 334 ["By its plain language, section 654 does not bar multiple punishment for multiple violations of the same criminal statute."].)

Second, the multiple victim exception to section 654 applies here. "The multiple-victims exception to section 654 is a statement of judicial policy that a defendant whose violent acts are aimed at or increase the risk of harm to several persons is more culpable than a defendant who harms only one." (*People v. Newman* (2015) 238 Cal.App.4th 103,

120.) Johnson's act of attacking Albert was aimed at Albert and, through aiding and abetting the co-perpetrator's attack on Andrew, increased the risk of harm to Andrew.

Johnson argues that the exception does not apply because he *personally* committed acts of violence only against Albert, and was alleged to have committed them against Andrew only through aiding and abetting. Johnson cites no authority, however, for the proposition that the multiple victim exception applies only if the defendant aimed violent acts at multiple victims personally, rather than by way of aiding and abetting. In light of the doctrine that an aider and abettor is liable as a principal (§ 31), we see no reason for making that distinction.

IV. Remand for transfer hearing

Johnson was 16 years old when the crimes took place in 2013. Under former Welfare and Institutions Code section 707, subdivision (d), the district attorney chose to prosecute him in adult court without an opportunity for a hearing in juvenile court regarding his fitness for juvenile proceedings.

At the November 8, 2016 election, after Johnson's conviction and sentencing, the voters approved Proposition 57. The new law became effective the day after the election. Proposition 57 amended Welfare and Institutions Code section 707 to require all juvenile offenses to be tried in juvenile court unless the prosecution requests a transfer hearing and obtains a ruling that the minor is not fit for juvenile proceedings. (Welf. & Inst. Code, § 707, subd. (a).)

The parties submitted supplemental briefing on the question of whether Proposition 57 applies retroactively to Johnson's case. They agreed that this case is controlled by *Lara, supra,* 4 Cal.5th 299. There, the California Supreme Court stated:

> "Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct what we will call a 'transfer hearing' to determine whether the matter should remain in juvenile court or be transferred to adult

court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult. (See Welf. & Inst. Code, § 707, subd. (a).)

"We must decide whether this part of Proposition 57 applies retroactively to benefit defendant. In *In re Estrada* (1965) 63 Cal.2d 740 …, we held that a statute that reduced the punishment for a crime applied retroactively to any case in which the judgment was not final before the statute took effect. In *People v. Francis* (1969) 71 Cal.2d 66 …, we applied *Estrada* to a statute that merely made a reduced punishment possible. *Estrada* is not directly on point; Proposition 57 does not reduce the punishment for a crime. But its rationale does apply. The possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, *Estrada's* inference of retroactivity applies. As nothing in Proposition 57's text or ballot materials rebuts this inference, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara, supra*, 4 Cal.5th at pp. 303-304.)

In *People v. Vela* (2017) 11 Cal.App.5th 68, 81 (review granted Jul. 12, 2017, G052282, matter transferred to Court of Appeal for reconsideration on other grounds), the Court of Appeal held that Proposition 57 applied retroactively; it ordered a conditional reversal and remand to the juvenile court, where the People could obtain a transfer hearing. The California Supreme Court cited this approach with approval in *Lara, supra*, 4 Cal.5th at pages 309-310, 313.

Our disposition below is based on these holdings.

DISPOSITION

The judgment is conditionally reversed and the case is remanded to the juvenile court. If the People make a motion for a transfer hearing under Welfare and Institutions Code section 707 within 90 days after the date this court issues its remittitur, and the juvenile court finds it would have transferred Johnson to a court of criminal jurisdiction, then the juvenile court must transfer the case back to a court of criminal jurisdiction, which shall reinstate the judgment.

If the People do not submit a timely request for a transfer hearing or the request is submitted and the juvenile court finds it would not have transferred Johnson to a court of criminal jurisdiction, the sentence will be vacated and the convictions and enhancement findings will be deemed juvenile adjudications. The juvenile court shall then conduct a dispositional hearing and impose a juvenile disposition within its discretion.

_____
SMITH, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
DESANTOS, J.